

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 3572 OF 2004.

B.R. Thadani
Residing at 9th floor,
Laspalmas Building,
Malbar Hill, Mumbai-400 006

..Petitioner.

V/s

1. Debts Recovery Appellate Tribunal
a Tribunal constituted under the
Recovery of Debts due to Banks
and Financial Institutions Act, 1993,
2. Debts Recovery Tribunal
a Tribunal constituted under
the Recovery of Debts due to
Banks and Financial Institutions
Act, 1993.
3. Oriental Bank of Commerce,
a banking corporation, incorporated
under the provisions of the Banking
Companies (Acquisition & Transfer
of Undertakings) Act, 1970, having
its office at Jash Chambers, Sir
P.M. Road, Fort Mumbai 400 001,
through Z.A. D'Souza, Assistant
General Manager.
4. The Official Liquidator,
being a Liquidator of Westerwork
Engineers Limited (A company in
Liquidation) having its office at
Bank of India Building, M.G. Road,
Fort, Mumbai 400 001.
5. Syndicate Bank,
a banking corporation, incorporated
under the provisions of the Banking
Companies (Acquisition & Transfer
of Undertakings) Act, 1970, having
its office at Manipal, Karnataka,
and a branch office, inter alia,

at Ballard House, Adi Marzban Path,
Ballard Pier, Mumbai 400 038,
through P.M. Umamaheshwaran,
Senior Manager

..Respondents.

Mr. F. Divitre Senior Counsel with Mr. J.P.Sen with
Ms. Bhena Singh i/b M/s Mulla & Mulla & CBC for
petitioner.

Ms. Mohana Nair for respondent No.3.

**CORAM : B.H. MARLAPALLE &
J.H. BHATIA, JJ.**

DATE : 14TH DECEMBER, 2006.

JUDGMENT (PER J.H. BHATIA, J.)

. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith. With the
consent of the Counsel the matter is taken for final
hearing immediately.

3. The petitioner, by this petition, seeks to quash
and set aside the order dated 26th February, 2004 passed
by the learned Debt Recovery Appellate Tribunal
directing pre deposit 30% of the amount found due from
him by DRAT, as a condition for hearing of appeal,
within eight weeks and also to quash and set aside the

order dated 22nd April, 2004 passed by the learned DRAT rejecting the Appeal No. 40/2004 due to failure of the petitioner to pre deposit 30% amount as per the direction.

4. According to the petitioner, he and his family members had held 90% of share holding of Western Work Engineers Ltd., while 10% of Equity Share holders was a German Collaborator. In or about August 1986, Voltas Ltd. agreed to purchase 51% of the petitioners' shareholding in the said Company immediately and also to take over balance 39% share in due course. In view of this, the petitioner withdraw from the active participation in the affairs of the said Company, while Voltas Ltd. after acquiring initially 26% of Equity Shares nominated two Directors and thereafter managed the affairs of the said Company. The said Company had obtained certain loans and Cash Credit Facilities from respondent No.3- Oriental Bank of Commerce and respondent No.5-Syndicate Bank prior to take over of the Company by Voltas Ltd. The petitioner had given personal guarantee for the said loans and cash credit facilities. On 19/6/1987 The Directors of the said Company, passed a Resolution to indemnify the petitioner

against all costs, claims or damages arising out of the personal guarantee given by him. As the guarantee was required to be continued for some more time, on 24th November, 1987 the petitioner forwarded to respondent No.3, Oriental Bank of Commerce, a Deed of Guarantee of the same date clearly stating that the guarantee would be valid for a period of six months only. In view of take over of the Company by Volta Ltd., it was understood that the corporate guarantee of Volta Ltd. would be obtained by respondent No.3. On 24th February, 1989 the company was declared sick. In spite of that respondent Nos. 3 and 5 continued to grant various facilities and advances to the said Company without the consent of the petitioner. On 8th April 1988, the petitioner addressed a letter to respondent No.3 and requested to return the documents of guarantee in view of the transfer of 51% of Equity Shares to Voltas Ltd., which had already assumed total management in June 1987. By the said letter the petitioner also informed the respondent No.3 that his personal guarantee would be withdrawn by the end of financial year i.e. 31st March, 1988. In any case, he had revoked the personal guarantee at least from the date of the said letter i.e. 8th April, 1988. Similar letters were written by him on

27th April and 23rd May, 1988. On 29th October, 1988 respondent No.3 indicated that they would release the petitioner from all liabilities under the guarantee on transfer of 51% of the shareholding to the Voltas Ltd. On 17th November, 1988 and 20th December, 1988 the petitioner informed respondent No.3 that the shares were in fact transferred to Voltas Ltd.

5. In Company Petition No. 459/1989, by order dated 6th September, 1996, this Court directed the said Company to be wound up and the Official Liquidator was appointed, who received total amount of Rs. 22,24,38,318/- after tax deduction at source as sale proceeds of the immovable property against which the loans of respondent No.3 were secured. Respondent No.3 also filed its claim before the Official Liquidator but as it was not satisfied with the amount of the claim admitted by the Official Liquidator, the respondent No.3 filed Original Application 645/2000 in the DRT against the Official Liquidator, Syndicate Bank and the present petitioner, who was the defendant No.2 in the said original application. Similarly, Syndicate Bank also filed Original Application No.646/2000 before the DRT against the Official Liquidator, present petitioner and

Oriental Bank of Commerce. In both the matters, the present petitioner was defendant No.2. It was the contention of the petitioner in both the matters, that his personal guarantee was revoked and finally it had come to an end on 23rd May, 1988, while the original applications were filed on 14/2/2000 and therefore, the claim of the Banks against the present petitioner was barred by limitation. After hearing the parties Original Application No. 645/2000 was decreed against the Official Liquidator for an amount of Rs. 7,32,52,933.86 with future interest at the rate of 16.50% p.a. from the date of filing of the application. However, the present petitioner was held to be jointly and severally liable to pay an amount of Rs. 2,69,00,742/- with interest and the Official Liquidator was directed to disburse the amount of sale proceeds to the Bank. In the said matter filed by the Oriental Bank of Commerce i.e. respondent No.3, the plea of limitation raised by the petitioner came to be rejected. However, in almost similar circumstances, in Original Application No. 646/2000 filed by Syndicate Bank, the plea of limitation taken by the petitioner was upheld and while the claim of the Syndicate Bank was decreed against the company, it was dismissed to the extent of

the present petitioner on the ground that it was barred by limitation.

6. The present petitioner preferred an Appeal No. 40 of 2004 before the DART challenging the decree passed against him in Original Application No. 645/2000. In that appeal also besides several other points, mainly he had contended that the original application against him was barred by limitation. He also prayed for waiver of pre deposit for the purpose of preference of appeal on the grounds that firstly he was not in financial condition to deposit such a huge amount and secondly, the Official Liquidator was holding huge amount of Rs. 22 crores which was more than sufficient to satisfy the decrees passed in favour of respondent No.3. However, the learned DRAT by order dated 26th February, 2006 refused to waive the condition of pre deposit completely but reduced the same to the extent of 30% and directed the petitioner to deposit 30% of the amount found due from him within eight weeks and in case of his failure to deposit the amount within prescribed period, the appeal would stand rejected without any further reference. The petitioner filed the present Writ Petition on 13th March, 2006, challenging the direction

for pre payment of 30%. Pending the Writ Petitions his appeal No.40/2003 also came to be dismissed on 22/4/2004, due to his failure to deposit the said amount. Therefore, by making an amendment to the petition, the petitioner also seeks to quash the said order and seeks restoration of the appeal to the file of DRAT.

7. The petition is contested by respondent No.3 by filing affidavits of its officer Mr. Narendra Kotiawala, as well as K.K. Taneja. The relevant documents are also placed on record. It is vehemently, contended by the learned Counsel for the petitioner that the facts were not taken into consideration by the DRAT while passing the impugned order directing him to pre deposit 30% of the amount due from him. According to him, prima facie there was substance in the contention of the petitioner that the original application was barred by limitation and secondly, the decretal amount of respondent No.3 was fully secured and the sale proceeds of the secured immovable property, in the hands of the official liquidator were much more than the total decretal amount. Therefore, it was absolutely unnecessary to direct the petitioner to make pre payment

of 30% of the amount. He contended that these aspects were not considered by the learned DRAT, which passed the impugned order merely observing that the financial condition of the petitioner was not a valid ground to completely waive the condition of the pre deposit.

8. Para 4 of the impugned order reads as follows:-

"As far as financial constraints of the appellant are concerned, in the application for waiver of deposit, it is nowhere stated that he is unable to pay the mandatory deposit of 75% as per the provisions of Section 21 of RDB Act. There is no documentary evidence annexed along with waiver application to give any indication as to what is financial condition of the appellant. The cause title reveals that the appellant is residing in a posh area at Malbar Hill, Mumbai. Provisions of Section 21 of the DRT Act are mandatory. Under that Section, deposit of 75% of the amount as determined by the Tribunal under Section 19 is a rule and any deviation therefrom is an exception.

Therefore, taking overall view of the matter, in my view, ends of justice will be met if the appellant is directed to deposit 30% of the amount of Rs. 2,69,00,742/- within eight weeks from today. Hence, following order is passed."

The impugned order has only considered the contention of the petitioner about his financial constraints and inability to deposit the amount as pre condition. No other contentions were taken into consideration by the

learned DRAT. In fact, in his application for waiver of deposit, the petitioner contended in para 3 and 5 as follows:-

"3. The Applicant further submits that the immovable properties of the principal debtor, M/s Westerwork Engineers Ltd. (Hereinafter the "said Company"), now in liquidation, which formed Respondent No.1's securities were sold under the directions of the BIFR for a sum of Rs. 20,22,60,000/-. The said sale proceeds were subsequently deposited with the Official Liquidator, High Court, Mumbai pursuant to an order dated 1st October, 1997 of the Hon'ble Bombay High Court."

" 5. The Applicant submits that an amount of Rs. 6,80,95,408/- is payable under the impugned order dated 15.1.2004 of the Debt Recovery Tribunal 1 (after giving due credit to the amount of Rs.3,62.91,150/- already received by Respondent No.1) as set out in the Statement (Exhibit "A" hereto) There is presently an amount of Rs/ 17.52.01,372/- lying with the Official Liquidator to the credit of the Company on account of sale of the said securities. As such, it is submitted that Respondent No.1's purported claim under the impugned order is fully secured."

9. At the outset, it may be stated that even though, as per the Judgment in Original Application No. 645/2000, a decree for amount of Rs. 7,32,52,933.86 was passed, later on it was corrected as Rs. 7,94,67,263.82. Decree for an amount of Rs. 9,23,62,522.34 was passed in favour of the Syndicate

Bank in Original Application No. 646/2000. As per report dated 28/4/2000, submitted by the Official Liquidator before the learned Company Judge in Company Petition No. 459/1989 the Official Liquidator had already paid an amount of Rs. 3,62,91,150/- to respondent No.3, Oriental Bank of Commerce and amount of Rs. 4,23,88,850/- to the Syndicate Bank as per the order dated 5th March, 1999, passed by the High Court. If the corrected decree in favour of respondent No.3 and the said report of the Official Liquidator are taken into consideration, it appears that an amount of Rs. 4,31,76,113/- is to be paid to Respondent No. 3 Oriental Bank and amount of Rs.4,99,73,672/- is to be paid to the Syndicate Bank as balance due in view of the earlier payments made by him. Beside, these two major payments, he has to make payment of Rs.32,30,367/- towards Sales Tax Department and amount of Rs. 2,24,84,576/- is required to be paid to the Workers of the Company. These total dues are to the tune of Rs. 11,88,64,729/- only. While there are demands of Rs. 19,56,000/- from M.S.E.B. and Rs. 6,13,56,193 from Income Tax Department. The claim of the MSEB is admitted to the tune of Rs. 16,36,754/- and the claim of Income Tax Department is yet to be adjudicated. As

per his report, the Official Liquidator is in possession of amount of Rs. 20,22,60,000/- and if all the above decrees and claims are satisfied, still he will have balance amount of more than Rs. two Crores. It may be paid to the different claimants para passu and in fact he has also sought directions from the learned Company Judge to make certain payments as dividends to the different claimants.

10. The report of the Official Liquidator clearly reveals, that the decretal amount can be fully satisfied out of the sale proceeds of the immovable property against which the loan was secured and in view of that, even though the petitioner may be guarantor, he may not be required to pay even a single rupee to the respondent No.3. If these aspects would have been taken into consideration by the learned DART, the request of the petitioner for waiver of pre deposit could not have been rejected. The record reveals that the learned DRAT did not consider the availability of funds with the Official Liquidator to satisfy the claim of the respondent No.3 and unnecessarily insisted for 30% pre deposit. Due to his financial constraints, the petitioner could not deposit the amount and in the result, his appeal was

also dismissed and thus, he was prevented from satisfying the DRAT that the claim of respondent No.3 against him was barred by limitation. The purpose of pre deposit is to see that even if the appeal is dismissed, the decretal amount should be recovered and taking benefit of the pendency of the appeal, the execution of the decree could not be put to jeopardy. If already the Official Liquidator has taken possession of all the properties against which loans were secured and the properties were also disposed off and the amount, which was much more than the decretal amount, was in the hands of the Official Liquidator, the possibility of any difficulty in execution of the decree was completely ruled out. Section 21 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 directs that where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution etc., such an appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy five per cent of the amount of debts so due from him as determined by the Tribunal. Proviso to Section 21 also provides that the Appellate Tribunal may, for reasons to be recorded in writing waive or reduce the amount to be

deposited under this Section. From this, it is clear that if there are just and proper reasons, the Appellate Tribunal may waive the condition of pre deposit by giving reasons to be recorded in writing. In view of the facts and circumstances noted above, there were sufficient reasons to waive the condition of pre deposit. Taking into consideration all these circumstances, we find that it is a fit case, where this Court should interfere by invoking extra ordinary jurisdiction under Article 226 of the Constitution of India.

11. For the aforesaid reasons, the impugned order dated 26/2/2004 passed by the learned DRAT in Misc. Application No 90/2004 in Appeal NO.40/2004, directing the petitioner/defendant No.2 to pre deposit 30% amount due from him, is hereby set aside. The impugned order dated 22/4/2004 rejecting the appeal No.40/2004 due to failure of the petitioner to fulfil the condition of pre deposit is also hereby set aside. The Appeal No. 40/2004 is hereby restored to the file of DRAT, Mumbai with a direction that the appeal shall be heard on merits without any condition of pre deposit.

12. Rule made absolute in terms of the above directions.

(J.H. BHATIA, J.)

(B.H. MARLAPALLE, J.)